

St. John's Law Review

Volume 75
Number 4 *Volume 75, Fall 2001, Number 4*

Article 7

March 2012

Miranda Survives to be Heard: Dickerson v. United States

James T. Pisciotta

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Pisciotta, James T. (2001) "Miranda Survives to be Heard: Dickerson v. United States," *St. John's Law Review*. Vol. 75 : No. 4 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol75/iss4/7>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

MIRANDA SURVIVES TO BE HEARD: DICKERSON v. UNITED STATES

JAMES T. PISCIOTTA†

INTRODUCTION

Very few Supreme Court decisions find their way out of the hallowed halls of academia into the stream of the American conscience. Even fewer decisions of the Court enjoy such practical and common enforcement as to render its holding a deeply embedded value of American culture. Still fewer cases epitomize an area of law with such vigor and clarity as to wholly symbolize the ideal of American justice. In 1966, the Supreme Court, in a landmark opinion penned by Chief Justice Warren, decided *Miranda v. Arizona*,¹ thereby achieving the aforementioned accolades and forever changing the landscape of American criminal procedure.

In its most general sense, *Miranda* effectively departed from the accepted standard that governed the admissibility of confessions and established that certain safeguards, which have

† J.D. Candidate June 2001, St. John's University School of Law; B.S., Greensboro College.

¹ 384 U.S. 436 (1966). Four separate cases were under appeal and heard collectively in the *Miranda* case. See *Westover v. United States*, 342 F.2d 684, 686–88 (9th Cir. 1965) (holding that defendant's confession of federal offenses made while in state police custody for state offenses was admissible where no abuses were shown), *overruled by* *Dickerson v. United States*, 530 U.S. 428 (2000); *State v. Miranda*, 401 P.2d 721, 733 (Ariz. 1965) (holding that defendant's confession was inadmissible when the police informed defendant of his rights but did not specifically inform of his right to assistance of counsel), *overruled by* *Dickerson v. United States*, 530 U.S. 428 (2000); *People v. Steward*, 400 P.2d 97, 102 (Cal. 1965) (finding that the defendant was entitled to counsel when a confession was taken and defendant had been in custody for five days), *overruled by* *Dickerson v. United States*, 530 U.S. 428 (2000); *Vignera v. United States*, 207 N.E.2d 527 (N.Y. 1965) (determining that a confession obtained by the assistant district attorney, prior to the arraignment deprived the defendant of his right to counsel), *overruled by* *Dickerson v. United States*, 530 U.S. 428 (2000). See generally Paul G. Cassell, *The Statute Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 181–91 (1999) (providing an overview of the facts surrounding the arrest and interrogation of *Miranda*).

collectively become known as the "*Miranda* Rights," must be communicated to an accused before any statement may be admitted into evidence. This Comment submits that the Supreme Court, in *Dickerson v. United States*,² was erroneous in concluding that 18 U.S.C. § 3501 was inapplicable, thereby allowing *Miranda* and its doctrine to continue as the prevailing standard governing the admissibility of defendant confessions.

The issue before the Court in *Miranda* was the admissibility of self-incriminating statements made by the accused during a police interrogation "while in custody or otherwise deprived of his freedom of action."³ In short, the Court ruled that "the prosecution may not use [an accused's] statements, whether exculpatory or inculpatory . . . unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."⁴ The "procedural safeguards" that the Court demanded be communicated to an accused consisted of four simple warnings: (1) You have the right to remain silent; (2) Anything you say may be used against you in a court of law; (3) You have the right to an attorney; and (4) If you cannot afford an attorney, one will be appointed for you.⁵ The ultimate import of the Court's decision was truly revolutionary. In essence, *Miranda* extended the protections of the Fifth Amendment privilege against self-incrimination beyond the controlled and monitored environment of the courthouse, where it had only existed previously, to the dark, often suspect setting of police interrogation rooms.⁶

² 530 U.S. 428 (2000) (holding that *Miranda*'s warning-based approach to determining admissibility of statements made during custodial interrogation was constitutionally-based and could not be overruled by legislation).

³ *Miranda*, 384 U.S. at 445. In each of the cases that led up to the decision in *Miranda*, the defendant was interrogated either by a police officer, detective, or a prosecuting attorney in a room where he was isolated from the outside world. *Id.*

⁴ *Id.* at 444; see also *Dickerson*, 530 U.S. at 431-32 (stating that the *Miranda* Court held that "certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence").

⁵ See *Miranda*, 384 U.S. at 444. The language of the decision is often paraphrased for ease of application. The precise language of the holding is as follows: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* The Court went on to rule that these rights may be waived by the suspect provided that the waiver was made voluntarily, knowingly, and intelligently. See *id.*

⁶ In pertinent part, the Fifth Amendment provides that "[n]o person shall be

In justifying its decision, the Court reasoned that each of the instant cases involved an "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."⁷ The Court was of the opinion that the communication of warnings to the accused prior to interrogation would diminish the "inherently compelling pressures" that exist when one is questioned in the custody of authorities.⁸

In addition to the holding, the *Miranda* opinion contained an interesting piece of dicta that suggested that this new rule of evidence did not establish the outer limits of the required constitutional protections, inviting Congress to exercise its legislative might to create alternative safeguards to protect against self-incrimination.⁹ In the not so distant future, this piece of dicta would serve as the political and judicial fodder to fuel attacks upon *Miranda*.

... compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Prior to the Court's decision in *Miranda*, a voluntary confession obtained in custody could be used in court, regardless of the person's knowledge of her constitutional right against self-incrimination. See Patrick McDermott, *United States v. Dickerson: Has Miranda Been Overruled?*, 52 BAYLOR L. REV. 191, 194 (2000); see also *Haynes v. Washington*, 373 U.S. 503, 514-15 (1963) (stating that the inquiry used when determining whether a confession was admissible is whether the Due Process Clause of the Fourteenth Amendment was violated, not whether the Fifth Amendment right against self-incrimination was violated); *Wilson v. United States*, 162 U.S. 613, 623 (1896) (holding that the "true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.").

⁷ *Miranda*, 384 U.S. at 445.

⁸ *Id.* at 467; see also Lucian Paul Sbarra, Note, *Wiping the Dust Off of an Old Statute: United States v. Dickerson Eliminates the Miranda Warnings*, 35 WAKE FOREST L. REV. 481, 490 (2000) (stating that "the provision of these warning requirements at the outset of the police interrogation would diminish the 'inherently compelling pressures' that presumptively arise during an interrogation of the accused while in custody") (quoting *Miranda*, 384 U.S. at 445)).

⁹ See *Miranda*, 384 U.S. at 467.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Id.

In reaction to public sentiment surrounding *Miranda*,¹⁰ and to the Court's open "invitation," Congress enacted 18 U.S.C. § 3501¹¹ with the "clear intention of restoring voluntariness as the test for admitting confessions into federal court."¹² In relevant part, § 3501(a) reads: "In any criminal prosecution brought by the United States . . . a confession . . . shall be admissible in evidence if it is *voluntarily* given."¹³ Prior to *Miranda*, the admissibility of a confession was determined under a voluntariness test devised at common law.¹⁴ This test of admissibility evolved from roots in the English common law,¹⁵

¹⁰ See Sbarra, *supra* note 8, at 491 (stating that the initial public reaction to the *Miranda* decision was hostile because it applied "retroactively to defendants who had been interrogated but not tried before *Miranda* had been decided.").

¹¹ 18 U.S.C. § 3501 (1994) (passed as part of the Omnibus Crime Control Act of 1968).

¹² *United States v. Dickerson*, 166 F.3d 667, 671 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000); see also 114 CONG. REC. 11,201 (1968) (statement of Senator McClellan) (stating that the "thrust of the *Miranda* ruling, if not changed, will sweep us into the throes of anarchy and horror").

¹³ 18 U.S.C. § 3501(a) (1994) (emphasis added). The statute further provides that when determining the admissibility of a confession, trial courts should consider:

[A]ll the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Id. § 3501(b).

¹⁴ See *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (stating that a conviction violates due process if it is based in whole or in part on an involuntary confession); *Hopt v. Utah*, 110 U.S. 574, 584-85 (1884) (stating the common law rule that confessions must be voluntary if they are to be admitted into evidence); McDermott, *supra* note 6, at 194 (noting that the earliest tests for admissibility of confessions were based on voluntariness).

¹⁵ At early common law there was no requirement that confessions be voluntary. See JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 818 (James H. Chadbourne ed., Little, Brown & Co. 1970). Courts later began to realize that coerced confessions were not reliable or trustworthy statements. See *The King v. Rudd*, 168 Eng. Rep. 160, 163-64 (K.B. 1793) (holding confessions obtained through threats and promises were to be excluded from English courts); *The King v. Warickshall*, 168 Eng. Rep. 234, 235 (K.B. 1783) ("[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be

and over time, American case law established two constitutional bases for the requirement that confessions be voluntary: the Fifth Amendment right against self-incrimination¹⁶ and the Fourteenth Amendment right of due process.¹⁷ Eventually, the rule against admitting coerced or involuntary confessions became based almost exclusively on due process rights, as guaranteed by the Fourteenth Amendment.¹⁸ In an interesting aside, Chief Justice Rehnquist, writing for the majority in *Dickerson*, noted that the due process method of jurisprudence used by the Court to exclude involuntary confessions has never been abandoned.¹⁹

A precarious situation presented itself with the passage of § 3501. Congress had expressly restored voluntariness as the touchstone of admissibility—seemingly in direct defiance of the Supreme Court's teaching in *Miranda*. Nevertheless, for many years, and through many administrations, the Justice Department refused to enforce § 3501, as the statute was believed to do violence to the *Miranda* doctrine.²⁰ Similar

given to it; and therefore it is rejected.”).

¹⁶ See *Bram v. United States*, 168 U.S. 532, 542 (1897) (stating that the voluntariness test is “controlled by that portion of the Fifth Amendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’”) (quoting U.S. CONST. amend. V).

¹⁷ See *Brown v. Mississippi*, 297 U.S. 280, 285–87 (1936) (holding criminal conviction invalid under the Due Process Clause because it was based on a confession obtained by physical coercion); see also *Upshaw v. United States*, 335 U.S. 410, 414 (1948) (finding that the challenged confessions were the “fruits of wrongdoing” by the police officers and thus inadmissible).

¹⁸ The Supreme Court applied the due process approach in numerous cases where the test was refined into a specific factual inquiry of “whether a defendant’s will was overborne” by the circumstances surrounding the confession. *Reck v. Pate*, 367 U.S. 433, 440 (1961) (citing *Chambers v. Florida*, 309 U.S. 227 (1940)); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1964) (noting that the ultimate inquiry is whether the confession was made voluntarily) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). This test took into consideration “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” *Schneckloth*, 412 U.S. at 226; see also *Reck*, 367 U.S. at 440 (“[A]ll the circumstances attendant upon the confession must be taken into account.”); *Payne v. Arkansas* 356 U.S. 560, 562 (1958) (declaring that a court must review the circumstances under which a confession was made in determining its admissibility); *Fikes v. Alabama* 352 U.S. 191, 197–98 (1957) (“The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.”) (quoting *Stein v. New York*, 346 U.S. 156, 185 (1953)).

¹⁹ See *Dickerson v. United States*, 530 U.S. 428, 432–34 (2000).

²⁰ See *Davis v. United States*, 512 U.S. 452, 457 (1994) (relying in part on *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) and *Teague v. Lane*, 489 U.S.

sentiments were frequently voiced in the academic, political, and popular arenas.²¹

Although § 3501 did not enjoy the support of the Department of Justice or the courts, a string of Supreme Court cases served to place great limitations on the once wide breadth of the *Miranda* doctrine.²² The ultimate importance of these cases is the common foundation upon which their respective findings were justified. In sum, these cases rested on the general proposition that the *Miranda* warnings were merely "prophylactic,"²³ established to protect an accused's Fifth Amendment right against self-incrimination, and were not necessarily required by the Constitution.²⁴ The Department of

288 (1989)). In a separate opinion in *Davis*, Justice Scalia condemned the Department of Justice for not supporting the enforcement of § 3501 in criminal prosecutions. See *id.* at 462-65 (Scalia, J., concurring); see also Eric D. Miller, *Should Courts Consider 18 U.S.C. 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1034-35 (1998) (stating that Attorney General Ramsey Clark instructed United States Attorneys not to admit confessions into evidence unless they comported with *Miranda*). Under the Clinton administration, the Department of Justice remained steadfastly opposed to enforcing § 3501. See Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 357-63 (discussing the Justice Department's refusal to enforce § 3501); Andrew W. Muller, Case Note, *Congress' Right to Remain Silent in Dickerson v. United States—Or—How I Learned to Stop Worrying and Love Miranda v. Arizona*, 34 CREIGHTON L. REV., 801, 810-11 (2001).

²¹ See Laurence H. Tribe, *Miranda Warning is Law of the Land*, BOSTON GLOBE, Feb. 15, 1999, at A99; see also 124 CONG. REC. 11,595 (1968) (statement of Senator Morse) (stating that "the Senate is kidding itself if it thinks it can amend the Constitution or the Bill of Rights with this [§ 3501] legislation"); STEPHEN A. SALZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 545 (5th ed. 1996); Yale Kamisar, *Perspective on Criminal Law: The Miranda Warning Takes a Body Blow*, L.A. TIMES, Feb. 17, 1999, at B7.

²² See *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (holding that there is a public safety exception to *Miranda*); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (holding that defendant's self-incriminating statements were admissible as impeaching evidence despite the fact that their admission as substantive evidence would have been in violation of *Miranda*).

²³ *Connecticut v. Barrett*, 479 U.S. 523, 528 (1989).

²⁴ See *Davis*, 512 U.S. at 457 (describing the *Miranda* warning as a "series of recommended 'procedural safeguards'") (quoting *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)); *Withrow v. Williams*, 507 U.S. 680, 690 (1993) ("*Miranda's* safeguards are not constitutional in character."); *Barrett*, 479 U.S. at 528 (1989) ("[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of the Fifth Amendment rights . . ."); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) ("The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'") (quoting *Tucker*, 417 U.S. at 444); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (stating that it is well established that the

Justice's refusal to enforce § 3501, along with the limitations the Supreme Court placed on *Miranda*, combined to form a ripe environment for a court to finally announce that § 3501, rather than *Miranda*, was the proper standard for determining the admissibility of a suspect's confession.²⁵ On February 8, 1999, in *United States v. Dickerson*,²⁶ the United States Court of Appeals for the Fourth Circuit did exactly that.²⁷ Later that year, the United States Supreme Court granted certiorari to review the holding of the Fourth Circuit;²⁸ the Court reversed, upholding *Miranda*.²⁹

This Comment contends that the Supreme Court's decision to uphold *Miranda* as the proper standard governing the admissibility of confessions, rather than apply § 3501, was

Miranda warnings are not themselves rights protected by the Constitution) (quoting *Quarles*, 467 U.S. at 654).

²⁵ See Sbarra, *supra* note 8, at 497 (stating that the "interplay between the Department of Justice's failure to enforce § 3501 and the Supreme Court's limits on the *Miranda* rule provided the fuel for the *Dickerson* court to pronounce § 3501 as constitutional and to eradicate the necessity for the *Miranda* warnings").

²⁶ 166 F.3d 667 (4th Cir. 1999) (holding § 3501, rather than *Miranda*, was the proper standard to determine the admissibility of confessions), *rev'd*, 530 U.S. 428 (2000). Prior to the Fourth Circuit deciding the *Dickerson* case, the issue of § 3501's applicability was squarely dealt with twice before. See *United States v. Crocker*, 510 F.2d 1129, 1138 (10th Cir. 1975) (holding that the trial court did not err when it applied § 3501 in concluding the defendant's confession was voluntary); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1435-36 (D. Utah 1977) (holding that § 3501 is constitutional and thus its analysis is the proper standard to determine admissibility of defendants' statements).

²⁷ This decision came as a shock to many observers, primarily because the issue of § 3501's applicability was not briefed by the Department of Justice on appeal. See *Dickerson*, 166 F.3d at 680-81. Regardless, the Fourth Circuit decided the issue *sua sponte*. See *id.* at 680-83. The court's decision to raise the issue *sua sponte* was met with opposition. See *id.* at 695-97 (Michael, J., dissenting) (stating that the court should not have reached the issue of the statute's application where it was not presented by the Department of Justice); see also Stephen J. Schulhofer, *Miranda Now on the Endangered Species List*, NAT'L L.J., Mar. 1, 1999, at A22 (referring to the *Dickerson* opinion as the "most surprising and ill-considered instance of 'judicial activism' in recent memory").

The court justified its action by stating that "we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it . . ." *Dickerson*, 166 F.3d at 672. The court accepted a brief and heard oral arguments from the Washington Legal Foundation, an *amicus curiae*, to familiarize itself with the issue before rendering its decision. See *id.* at 680-82 n.14.

²⁸ See *Dickerson v. United States*, 528 U.S. 1045 (1999).

²⁹ *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that "*Miranda* and its progeny . . . govern the admissibility of statements made during custodial interrogation in both state and federal courts").

erroneous. A thorough reading of *Miranda* reveals that it was not a constitutionally grounded decision and therefore Congress, not the Supreme Court, had the power to enact a superior rule of evidence. This proposition is supported in Part I of this Comment by a brief presentation of the relevant facts of *Dickerson*, and the district court's handling of the case. Part II, in addition to exploring the Fourth Circuit's controversial procedural treatment of the case, considers the justifications behind its holding. Part III focuses on the Supreme Court's reversal of the Fourth Circuit's decision and posits various theories why the Court's rationale was misguided. Finally, Part IV asserts that although the affirmation of *Miranda* has little immediate practical effect, it has very real and negative consequences for the future.

I. THE FACTS OF *DICKERSON*

In early 1997, an individual brandishing a silver semi-automatic handgun and carrying a black leather bag, stole \$876 from the First Virginia Bank.³⁰ An eyewitness spotted the robber leaving the bank and getting into a white Oldsmobile Ciera.³¹ Seconds later, the robber got out of the car, placed something in the trunk, re-entered the vehicle, and drove off.³² Upon subsequent investigation into the bank robbery, it was discovered that the white Oldsmobile was registered to Charles Dickerson of Takoma Park, Maryland.³³ Upon arriving at the Dickerson residence, law enforcement agents identified the vehicle in the driveway as the same car used in the robbery.³⁴ The agents then knocked on Dickerson's door and asked him to accompany them to the office of the Federal Bureau of Investigation (FBI) to answer some questions pertaining to a bank robbery they were investigating.³⁵ As Dickerson reached for his jacket, one of the agents noticed a large sum of money resting on the bed.³⁶ Dickerson placed the money in his jacket pocket, explaining that the funds were the recent spoils of a

³⁰ *Dickerson*, 166 F.3d at 673. The bank was in Alexandria, Virginia. *Id.*

³¹ *Id.* The eyewitness was also able to identify that it was a District of Columbia license plate, number D5286. *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

gambling trip to Atlantic City.³⁷ Dickerson then rode off with the agents to the FBI office, not yet having been placed under formal arrest or handcuffed.³⁸

During an interview at the FBI office, Dickerson admitted that he was in Old Town, a town located near the bank, on the day of the robbery, but denied having any involvement with the robbery in question.³⁹ Based on Dickerson's affirmation placing himself near the bank on the day of the robbery, along with the detection of a large amount of cash in his home, the agents obtained a warrant to conduct a search of Dickerson's apartment.⁴⁰ After being notified that his apartment was about to be searched, Dickerson informed the agents that he wanted to make a statement.⁴¹ He admitted to having been the getaway driver in numerous robberies, but identified another individual, Jimmy Rochester, as the person who committed the bank robbery in question.⁴² At this point, Dickerson was formally placed under arrest.⁴³ Jimmy Rochester, who was subsequently arrested, promptly corroborated Dickerson's story.⁴⁴ Meanwhile, the search of Dickerson's apartment and car had produced evidence connecting him to the Alexandria bank robbery.⁴⁵ Based on his confession, Rochester's statements, and the physical evidence uncovered in his apartment and car, Dickerson was indicted by a federal grand jury on numerous charges of robbery related crimes.⁴⁶

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 673-74.

⁴¹ *Id.* at 674.

⁴² *Id.*

⁴³ *Id.* Dickerson told the agents that Rochester gave him a gun and dye-stained money. *Id.*

⁴⁴ Rochester admitted to robbing numerous banks throughout Virginia and Maryland, and that Dickerson was his getaway driver in each of the robberies. *Id.*

⁴⁵ *Id.* The evidence found included: a silver semi-automatic handgun, dye-stained money, a "bait-bill", ammunition, masks, latex gloves, and a black leather bag. *Id.*

⁴⁶ *Id.*

Dickerson was indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), on three counts of bank robbery in violation of 18 U.S.C.A. § 2113(a) and (d) (West Supp. 1998), and three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c)(1) (West Supp. 1998).

Id.

In the United States District Court for the Eastern District of Virginia, Dickerson filed a motion to suppress the statements he made while at the FBI office prior to his arrest, along with the evidence uncovered as a result of those statements.⁴⁷ At the suppression hearing, an agent "testified that Dickerson was read . . . his rights under *Miranda* prior to his confession."⁴⁸ Conversely, "Dickerson testified that he confessed prior to being read . . . his *Miranda* rights and about thirty minutes after being informed about the warrant to search his apartment."⁴⁹ Having found defendant Dickerson's testimony more credible,⁵⁰ the district court suppressed his confession, thereby excluding from evidence his inculpatory statement and some of the physical evidence obtained in its wake.⁵¹ Because the Government's motion to reconsider the district court's order suppressing Dickerson's statement was denied,⁵² the Government filed an interlocutory appeal.⁵³ In accordance with tradition and

⁴⁷ *Id.* The evidence Dickerson sought to suppress was the physical evidence obtained during the searches of his apartment and his car. *Id.*

⁴⁸ *Id.* at 675. The agent continued to testify that Dickerson made his statement "shortly after" he obtained the search warrant. *Id.*

⁴⁹ *Id.*

⁵⁰ This finding rested partly on the fact that the agent's testimony—that Dickerson had been read his *Miranda* rights prior to his making the inculpatory statement—was contradicted by a time line which established that the confession was given before (8:50 p.m.) Dickerson executed the Advice of Rights Form (9:41 p.m.). *Id.* at 675–76. "The documentary evidence, which clearly contradicted [the agent's] testimony, was not the only reason the district court gave for finding that [the agent's] testimony lacked creditability." *Id.* at 675 n.6.

⁵¹ *Id.* at 675. Although the district court suppressed Dickerson's statement, the district court refused to suppress Rochester's statement, which named Dickerson as the getaway driver. *Id.* at 676. Applying *United States v. Elie*, 111 F.3d 1135, 1143 (4th Cir. 1997), the court reasoned that "evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause Because Dickerson's statement was voluntary . . . the evidence found as a result thereof was admissible" *Dickerson*, 166 F.3d at 676. The physical evidence obtained at the Dickerson residence was suppressed because the warrant was found by the court to be "insufficiently particular in describing the items to be seized." *Id.* Finally, the evidence discovered in the trunk of Dickerson's car was admitted into evidence because, unlike the warrant to search Dickerson's apartment, this warrant was sufficiently particular in describing the items to be seized. *Id.*

⁵² *United States v. Dickerson*, 971 F. Supp. 1023, 1025 (E.D. Va. 1997), *rev'd*, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). The Government took the position in its motion for rehearing that Dickerson's statement was voluntary, therefore admissible into evidence under 18 U.S.C. § 3501 (1985). *See Dickerson*, 166 F.3d at 676.

⁵³ *See Dickerson*, 166 F.3d at 677.

Department of Justice policy, the Government promptly withdrew its contention that Dickerson's statement was admissible under § 3501.⁵⁴

II. THE FOURTH CIRCUIT DECISION

Despite the Government's refusal to raise the issue of § 3501's applicability, Judge Karen Williams, writing for the two-judge majority, considered the issue *sua sponte*.⁵⁵ In concluding that "the proper administration of criminal law cannot be left merely to the stipulation of [the] parties,"⁵⁶ the court of appeals held that § 3501, rather than *Miranda*, governed the admissibility of the defendant's statements.⁵⁷ Judge Michael, in his dissenting opinion, stated that in "pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority [took] on more than any court should."⁵⁸

⁵⁴ *Id.* at 672.

⁵⁵ *Id.* at 682 (stating that the Government's refusal to raise the issue of the statute's applicability did not prevent the court from deciding the case); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (stating that the issues to be determined are within the discretion of the courts of appeals). *See generally* *Carlisle v. United States*, 517 U.S. 416 (1996) (discussing the extent to which the district courts have the power to act *sua sponte*).

⁵⁶ *Dickerson*, 166 F.3d at 682 (quoting *Young v. United States*, 315 U.S. 257, 259 (1942)).

⁵⁷ *Id.* at 695. The court, relying on the fact that several exceptions to *Miranda* have been established, and that the Supreme Court itself has repeatedly referred to the *Miranda* warnings as prophylactic and not required by the Constitution, concluded that *Miranda* was not a constitutionally grounded decision. Therefore, the court continued, Congress possessed the authority to supersede *Miranda* and enact federal rules of evidence and procedure. *See id.* at 690.

The law in this area is well settled. The Supreme Court has supervisory authority over the federal courts to establish non-constitutional rules of evidence and procedure. *See Carlisle*, 517 U.S. at 425–26. The Court's authority to establish non-constitutional rules of evidence and procedure, however, exists only in the absence of a relevant act of Congress. *See Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959); *see also* *Gordon v. United States*, 344 U.S. 414, 418 (1953); *Funk v. United States*, 290 U.S. 371, 382 (1933). Therefore, "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence or procedure that are not required by the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *see also* *Vance v. Terrazas*, 444 U.S. 252, 265 (1980); *Palermo*, 360 U.S. at 345–48. Hence, Congress may not legislatively supersede the Court's decisions that interpret and apply the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 517–20 (1997) (discussing congressional power to enact legislation serving to deter or remedy a constitutional violation).

⁵⁸ *Dickerson*, 166 F.3d at 695 (Michael, J., dissenting). In declining to join the majority, Judge Michael advanced several justifications, including the argument

III. THE SUPREME COURT'S HOLDING

Upon review, the Supreme Court squarely presented the issue before it by stating, "This case . . . turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."⁵⁹ Although conceding the presence of language in prior opinions supporting the position taken by the Fourth Circuit, the Court reversed the lower court's finding and held *Miranda* was indeed a constitutional decision.⁶⁰ The Court based its conclusion on several seemingly incorrect suppositions.

First, the Court reasoned that because *Miranda* and its progeny have consistently been applied in state tribunals,⁶¹ *Miranda* must therefore be of constitutional origin.⁶² In conclusive fashion, the Court reached this point by stating that "[w]ith respect to proceedings in state courts, [its] 'authority is limited to enforcing the commands of the United States Constitution.'"⁶³ The Court made a similar argument based on habeas corpus.⁶⁴ A habeas corpus proceeding is available only "for claims that a person 'is in custody in violation of the Constitution or laws or treaties of the United States.'"⁶⁵ The

that courts should not interfere with executive discretion in criminal matters. *See id.* at 695-97 (Michael, J., dissenting). Perhaps his most compelling argument against the majority is that Dickerson's confession was examined under the umbrella of § 3501 when the statute was only raised in an *amicus* brief. *See id.* at 697; *see also supra* note 26. Judge Michael believed this procedure went "against the adversarial system because it forces judges to rule on issues without the benefit of a traditional party-based legal argument." Brooke B. Grona, Comment, *United States v. Dickerson: Leaving Miranda and Finding a Deserted Statute*, 26 AM. J. CRIM. L. 367, 378-79 (1999) (discussing Judge Michael's dissenting opinion).

⁵⁹ *Dickerson*, 530 U.S. at 437.

⁶⁰ *See id.* at 432.

⁶¹ *See Stansbury v. California*, 511 U.S. 318 (1994) (per curiam); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Robertson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981).

⁶² *See Dickerson*, 530 U.S. at 438.

⁶³ *Id.* (quoting *MuMin v. Virginia*, 500 U.S. 415, 422 (1991)); *see also Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) (per curiam). The Court began its analysis by establishing that federal courts do not have supervisory power over state courts. *See Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Cicenia v. Lagay*, 357 U.S. 504, 508-09 (1958), *overruled by Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁴ *Dickerson*, 530 U.S. at 439 n.3.

⁶⁵ *Id.* (quoting 28 U.S.C. § 2254(a)).

Court drew the inference that because, historically prisoners have been allowed to bring habeas corpus proceedings in federal court based on alleged *Miranda* violations, it must follow that *Miranda* is a constitutionally based decision as it does not derive from federal laws or treaties.⁶⁶

Secondly, the Court pointed to numerous textual passages in both *Miranda* and subsequent cases containing explicit language supporting the finding that *Miranda* is constitutionally required.⁶⁷ The Court stated that the purpose of granting certiorari in *Miranda* was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."⁶⁸

Next, the Court justified its finding by citing the passage of text in *Miranda* which invited Congress to pass legislation to protect an individual's right against self-incrimination.⁶⁹ The Court asserted that because the invitation was qualified—to the extent that "the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were 'at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it' "⁷⁰—*Miranda* was constitutionally required.

Finally, the Fourth Circuit's contention that *Miranda* was not a constitutionally based rule, as evidenced by its numerous exceptions to the *Miranda* rule, was swept aside by the Supreme Court.⁷¹ Stating that "no constitutional rule is immutable,"⁷² the Court reasoned that the existence of exceptions to *Miranda* does not negate its constitutionality. Rather, the exceptions to *Miranda* "are as much a normal part of

⁶⁶ *Id.*

⁶⁷ *See id.* at 439–40.

⁶⁸ *Miranda v. Arizona*, 384 U.S. 436, 441–42 (1966); *see also id.* at 490 ("[T]he issues presented are of constitutional dimensions and must be determined by the courts."). Similar language appears in cases subsequent to *Miranda* as well. *See Withrow v. Williams*, 507 U.S. 680, 691 (1993) (stating that "*Miranda* safeguards a 'fundamental trial right' ") (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 269, 264 (1990)); *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (stating that the *Miranda* warnings rest on the Fifth Amendment right against self-incrimination); *Moran v. Burbine*, 475 U.S. 412, 427 (1986) (referring to *Miranda* as the Court's interpretation of the United States Constitution).

⁶⁹ *Dickerson*, 530 U.S. at 440.

⁷⁰ *Id.* (quoting *Miranda*, 384 U.S. at 467).

⁷¹ *See id.* at 441.

⁷² *Id.*

constitutional law as the original decision."⁷³

IV. ANALYSIS

It seems illogical to justify *Miranda* as a constitutionally based decision merely because its doctrine has been applied in state court proceedings. Rather, *Miranda* should be understood not as a constitutional demand, but as an exercise of the Court's authority to devise a remedy for a potential violation of a constitutional right, when neither the legislature nor the Constitution offers one.⁷⁴ These improvisational remedies are known as "constitutional common law,"⁷⁵ and are not required by the Constitution but are designed to assist in the protection of constitutional rights.⁷⁶ Since constitutional common law applies to the States as well as the federal government,⁷⁷ the conclusion that *Miranda* is merely a decision of constitutional common law and not required by the Constitution seems more rational than the reasoning employed by the Court. It is argued that congressional action may supersede judicially created constitutional common law.⁷⁸ Therefore, it is submitted that the Fourth Circuit was correct in applying § 3501, rather than the constitutional common law doctrine of *Miranda*, as the appropriate standard governing the admissibility of confessions.

Similarly, the Court was misguided in contending *Miranda* was of constitutional origin merely because prisoners in the past have been allowed to bring habeas corpus proceedings based on alleged *Miranda* violations.⁷⁹ The Court's reasoning was flawed when it concluded that because *Miranda* was not a federal law or

⁷³ *Id.*

⁷⁴ See Cassell, *supra* note 1, at 237. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷⁵ Craig Goldblatt, *Harmless Error as Constitutional Common Law: Congress's Power to Reverse Arizona v. Fulminate*, 60 U. CHI. L. REV. 985, 986 (1983) (explaining "constitutional common law" as a "judicially created prophylactic rule designed to protect constitutional rights, but not itself an interpretation of the Constitution").

⁷⁶ See Cassell, *supra* note 1, at 237; Goldblatt, *supra* note 75, at 986; see also Henry P. Monaghan, *The Supreme Court 1974 Term: Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

⁷⁷ See *Mapp*, 367 U.S. at 656-57.

⁷⁸ See *Carlson v. Green*, 446 U.S. 14, 51 (1980) (Rehnquist, J., dissenting).

⁷⁹ See *supra* notes 63-65 and accompanying text for a discussion of the Court's analysis regarding habeas corpus proceedings and the constitutionality of *Miranda*.

treaty, it must be of constitutional status.⁸⁰ A “law” for the purposes of habeas corpus proceedings is simply not confined to the spectrum of federal statutes.⁸¹ Furthermore, in *Withrow v. Williams*,⁸² the jurisdictional basis upon which the Court ruled that *Miranda* claims can lead to a habeas corpus proceeding is not at all clear.⁸³ Therefore, based on the absence of clear doctrine in *Withrow*, the Court’s decision that *Miranda* was of constitutional status because it is not a law or a statute, is too attenuated.

By relying on language in *Miranda* and in later opinions that suggests *Miranda* is constitutional in character, the Court partakes in an ill-advised, two-fold practice. First, nowhere in *Miranda* are the warnings ever regarded as strict constitutional requirements. Second, to read the language in a vacuum ignores precedent established in subsequent cases. Since *Miranda*, the Court has “explicitly, and repeatedly, interpreted that decision as having announced . . . only ‘prophylactic’ rules.”⁸⁴ In ignoring this precedent, the Court clearly strayed from a cornerstone of the American judicial system—*stare decisis*—in order to achieve its seemingly desired outcome.⁸⁵

Moreover, interpreting the Court’s “invitation” to Congress to pass legislation to protect an accused’s right against self-incrimination—providing any such efforts would not be precluded by the Constitution and were at least as effective as *Miranda*⁸⁶—is another misreading of the *Miranda* decision. The fact that such an “invitation” was even given “provides a striking

⁸⁰ See *supra* notes 63–65 and accompanying text.

⁸¹ See *Bush v. Muncy*, 659 F.2d 402, 407 (4th Cir. 1981) (finding an interstate compact to be within the meaning of a “law” for a habeas corpus proceeding); Cassell, *supra* note 1, at 240 (stating that “[a] ‘law’ for purposes of federal habeas corpus review . . . consists not merely of federal statutes”).

⁸² 507 U.S. 680 (1993).

⁸³ In *Stone v. Powell*, 228 U.S. 465 (1976), the Court held that “when a State has given a full and fair chance to litigate a Fourth Amendment claim, federal habeas review is not available to a state prisoner alleging that his conviction rests on evidence obtained through an unconstitutional search or seizure.” *Withrow v. Williams*, 507 U.S. at 682–83. In *Withrow*, the Supreme Court declined to extend the restriction announced in *Stone* to a state prisoner’s claim that his conviction was based on statements obtained in violation of *Miranda*. See *id.* at 688–95. The majority found that the jurisdictional issue was “beyond the question [for which certiorari was granted].” *Id.* at 685–86 n.2.

⁸⁴ *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting).

⁸⁵ *Id.* at 465.

⁸⁶ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

reason to view *Miranda* as a non-constitutional decision.”⁸⁷ It seems the correct interpretation of the Court’s “invitation” in *Miranda* is that the Court could simply do away with the prophylactic safeguards if Congress enacted legislation that was “at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.”⁸⁸

In enacting § 3501, Congress created a statute that extends beyond the pre- and post-*Miranda* doctrines that protect an individual’s right against self-incrimination.⁸⁹ One example of this, § 3501(b)(2), requires that the “defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession”⁹⁰ This protection is novel and more inclusive than any protection afforded to an accused individual by current case law.⁹¹ In short, the enumerated factors of § 3501 provide an accused with more protections against self-incrimination than *Miranda*. A statute that goes beyond the scope of *Miranda* is at least as effective as *Miranda*.

To determine its efficacy, the statute must also be considered in light of several other protections available to a defendant. 18 U.S.C. § 242 states that “[w]hoever, under color of

⁸⁷ Cassell, *supra* note 1, at 242 n.315.

⁸⁸ *Miranda*, 384 U.S. at 467; *see also* Cassell, *supra* note 1, at 242 (noting that “the Court could simply dispense with *Miranda* safeguards” if it were shown other procedures that were as effective as the safeguards set forth in *Miranda*).

⁸⁹ *See* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 129 (stating that § 3501 “does not wholly sweep aside *Miranda* . . . [and] the legislative enumeration of factors arguably gives them a special status” that did not necessarily exist before *Miranda*).

⁹⁰ 18 U.S.C. § 3501(b)(2) (1994); *see also* 18 U.S.C. § 3501(b)(3) (making a consideration of “whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him”). “This section is broader than pre-*Miranda* law in recognizing a suspect’s right to remain silent during police questioning.” Cassell, *supra* note 1, at 244; *see also* 18 U.S.C. § 3501 (b)(4) (recognizing the right to counsel during interrogation by requiring consideration of “whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel”).

⁹¹ *See* *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (noting that in order for a defendant to waive his rights he must be “knowing” and “intelligent”); *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that the failure of the police to inform an accused of the nature of the offense did not affect his decision to waive his Fifth Amendment right against self-incrimination); *Moran v. Burbine*, 475 U.S. 412, 421–24, 432–34 (1986) (holding that the failure to inform the accused of an attorney’s telephone call to the jail did not deprive him of knowledge essential to waive his Fifth Amendment rights).

any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both.”⁹² This civil rights statute will be enforced against law enforcement agents who coerce statements from an accused in violation of the Fifth Amendment.⁹³

In addition to criminal sanctions, civil liability may be imposed on law enforcement agents who violate a suspect’s constitutional rights. In *Bivens v. Six Unknown Named Agents*,⁹⁴ the Court held that a federal cause of action seeking damages was viable, where federal agents acting under the color of their authority violated a suspect’s constitutional right.⁹⁵ The *Bivens* doctrine has been consistently applied in situations where either the Fifth Amendment or the Due Process Clause is violated in an unconstitutional interrogation.⁹⁶ In short, uncertainty regarding the effectiveness of § 3501 is lessened when it is considered in conjunction with the other available protections.⁹⁷

Lastly, the Court’s contention that not even a constitutional rule is immutable does not defeat the argument that the existence of numerous exceptions to *Miranda* strongly suggests that it is not constitutionally required.⁹⁸ The majority’s line of reasoning is flawed; *Miranda* is constitutionally required but if law enforcement agents violate it, they do not violate the Constitution.⁹⁹ In his dissenting opinion, Justice Scalia claims the majority is “play[ing] word games” by continuing to place a constitutional stamp on a doctrine it continues to riddle with

⁹² 18 U.S.C. § 242 (1994).

⁹³ See *United States v. Lanier*, 520 U.S. 259, 271 (1997) (stating that “beating to obtain a confession plainly violates § 242”) (citing *Williams v. United States*, 341 U.S. 97, 101 (1951)).

⁹⁴ 403 U.S. 388 (1971).

⁹⁵ See *id.* at 389. Prior to *Bivens*, it was not possible to bring a cause of action seeking damages against a law enforcement official. See *Bell v. Hood*, 327 U.S. 678 684–85 (1946).

⁹⁶ See, e.g., *Wilkins v. May*, 872 F.2d 190, 194–95 (7th Cir. 1989) (upholding a *Bivens* claim where due process was violated by police misconduct during an interrogation).

⁹⁷ Chief Justice Rehnquist stated that the line of due process jurisprudence used by the Court before *Miranda* has not been abandoned, and should not be forgotten. See *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

⁹⁸ See *id.* at 451–54 (Scalia, J., dissenting).

⁹⁹ See *id.* at 454.

exceptions.¹⁰⁰ In light of the cases that have limited the scope of *Miranda*, "it is simply no longer possible for the Court to conclude . . . that a violation of *Miranda*'s rules is a violation of the Constitution."¹⁰¹ It appears that *Miranda* should no longer be considered a constitutional rule and its continued enforcement over that of § 3501 "offends [the] fundamental principles of separation of powers."¹⁰²

CONCLUSION

Affirming *Miranda* has little practical effect today, but it has very real and negative implications for tomorrow.¹⁰³ The Fourth Circuit made it clear when it dispensed with the notion that *Miranda* was required by the Constitution that "nothing in . . . [the] opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings [T]hose warnings are among the factors a district court should consider when determining whether a confession was voluntarily given."¹⁰⁴ Federal agents continued to dispense the *Miranda* warnings in all five states in the Fourth Circuit *after* its decision.¹⁰⁵ This is further supported by statements from former Attorney General Reno pledging allegiance to *Miranda* even if *Miranda* were to be overturned by the Court.¹⁰⁶

Nevertheless, the affirmation of *Miranda* has very real and negative consequences for the future. Despite the *Miranda* Court's assurance that "[its] decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform," no efforts of reform have been made other than the passage of § 3501.¹⁰⁷

The *Miranda* decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Scott Turow, *Miranda's Values in the Trenches*, N.Y. TIMES, June 28, 2000, at A27 ("[T]he truth is that . . . [upholding] *Miranda* has little practical impact on the interaction between suspects and [law enforcement agencies].").

¹⁰⁴ *United States v. Dickerson*, 166 F.3d 667, 692 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

¹⁰⁵ See Cassell, *supra* note 1, at 251.

¹⁰⁶ See Brief for the Appellee at 35 n.21, *Dickerson v. United States*, 520 U.S. 428 (2000) (No. 99-5525) ("Federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of *Miranda*.").

¹⁰⁷ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

possibility of developing and implementing alternatives that would be more effective, both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. Nothing is likely to change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it.¹⁰⁸

Unfortunately, it appears that the 5-4 decision from 1966 will "forever be enshrined as the mandate approach for regulating police interrogation"¹⁰⁹ until the Court itself takes on a legislative role and unilaterally decides that the nation and criminal justice are best served by other means. This proposition conflicts with the fundamental notion of separation of powers and with the belief that the law should twist and turn in harmony with society.¹¹⁰ *Miranda* survives despite more effective alternatives and the fact that guilty persons are set free on *Miranda* technicalities. Are these acceptable costs?

The Supreme Court chose to affirm *Miranda*. An opportunity for change has been lost. The projection of Justice White's dissent in *Miranda* rings more true than ever before: "In some unknown number of cases the Court's rule [in *Miranda*] will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him."¹¹¹ Even if this possibility is remote, is the cost simply too high?

¹⁰⁸ See U.S. Dep't of Justice, Office of Legal Policy, Report to the Attorney General of the Law of Pre-trial Interrogation 55 (1986).

¹⁰⁹ Cassell, *supra* note 1, at 257 (explaining that *Miranda* is not the definitive response to protections embodied by the Fifth Amendment).

¹¹⁰ See generally *McLamore v. South Carolina*, 409 U.S. 934, 936 (1972) (Douglas, J., dissenting) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹¹¹ *Miranda*, 384 U.S. at 542 (White, J., dissenting).

